

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

KAYLA L LONG

Claimant

APPEAL NO. 11A-UI-08357 -VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

WILD ROSE CLINTON LLC

Employer

OC:05/22/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated June 14, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 11, 2011, in Davenport, Iowa. Claimant participated. April McLain and Kim Leibert were witnesses for the claimant. The claimant was represented by Melinda Eshbaugh, attorney at law. Employer participated by Maria Machu, front of the house supervisor; Andrea Hardy, supervisor food and beverage; Gary Korver, assistant manager – food and beverage; Sharon DeHart, human resources manager; and Stan Seago, hospitality manager. The record consists of the testimony of Sharon DeHart; the testimony of Maria Machu; the testimony of Andrea Hardy; the testimony of Gary Korver; the testimony of Stan Seago; the testimony of Kim Leibert; the testimony of Kayla Long; the testimony of April McLain; Claimant's Exhibits A-G; and Employer's Exhibits 1-7.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of all the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a casino and entertainment center located in Clinton, Iowa. The claimant was hired on June 2, 2008. Her last day of actual work was May 14, 2011. She was terminated on May 17, 2011. At the time of her termination, she was a full-time bartender.

The incident that led to the claimant's termination began on May 13, 2011. This date was a Friday. The casino is open for gaming on Fridays and Saturdays until 4:00 a.m. Last call for drinks is at 1:00 a.m. Drinks are collected at 1:30 a.m. The employer is governed by Iowa law and regulations issued by the Iowa Racing and Gaming Commission. The employer is prohibited from allowing an intoxicated person to gamble. In order to comply with this law, the employer only permits a guest to be served one alcoholic beverage every 30 minutes. A

cocktailer, the employee who takes drink orders and serves them to guests on the gaming floor, keeps track of drink consumption with tickets that identify when an individual orders a drink.

If a cocktailer takes a drink order on the gaming floor, he or she goes to the bar and tells the bartender what the order is. The cocktailer then enters the order into a computer system that records when the drink is ordered. The cocktailer may also swipe what is known as a player's card. Guests of the casino may have a player's card, which is type of rewards card. A guest may be entitled to a beverage, for example, based on their patronage of the casino. The player's card records are not generally available to the staff and can only be accessed by upper management.

What occurred on May 13, 2011, is disputed by the parties. One of the guests that evening was a gentleman who came to the casino once or twice a month. He was known to the employees. He had a player's card. He sat at a gaming table in the back corner and generally ordered an alcoholic drink every 30 minutes. On occasion he would order a drink before his 30 minutes were up and he had to be reminded of the casino rule on 30 minutes between drinks.

Kim Leibert and another cocktailer named Hope were working as servers. The claimant and another employee named Heather were bartending. The guest had ordered a drink at 12:50 a.m. Last call was made at 1:00 a.m. The guest claimed he did not hear last call. At 1:12 a.m., a drink order was entered in the computer system for this patron. When the guest was actually served is not known. Heather made the drink at the request of Andrea Hardy, who was the supervisor on duty.

The next day, May 14, 2011, the claimant asked for a meeting with Frieda Strub concerning the serving of the drink the previous night. Gary Korver was asked to sit in as a witness. What the claimant said is also disputed by the parties. The employer understood the claimant to report that Andrea Hardy had permitted the patron get a drink at 1:10 a.m. and had directed that the drink not be entered into the system until 1:20 a.m. The claimant said that what she reported was that drink was ordered after the 1:10 a.m. cutoff time for entering drinks into the system and that the patron was served before his 30 minutes expired. She believed that Andrea Hardy had told Heather to make the drink at 1:10 a.m. but not enter the drink order until 1:20 a.m.

Maria Machu investigated the claimant's report and determined she had made a false accusation, which was a violation of the employer's written demeanor policy. The claimant had had three prior violations of the policy and was on her final warning. The final warning was given on March 26, 2011. The claimant knew her job was in jeopardy. In addition, another employee told the employer on May 15, 2011, that the claimant was repeating personal information about him to a guest. The employer could not confirm this complaint. The claimant denied doing this. The employer did not want to talk to the guest about internal matters and so nothing could be resolved on this complaint.

The employer concluded that the claimant had knowingly made a false accusation that a supervisor violated policy concerning the serving of alcoholic beverages. The claimant was terminated on May 17, 2011.

The claimant had been previously suspended for three days in August 2010, for a violation of the employer's alcohol policy. A guest had become intoxicated and the employer determined that the guest had been served drinks prior to the expiration of the 30 minutes between drinks.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

The claimant was discharged because the employer believed she knowingly made a false statement that a supervisor violated the employer's policy on serving alcohol. It was not entirely clear what the employer's policy was on serving alcohol and when. The employer is prohibited from allowing intoxicated guests to gamble. An internal 30-minute policy was in place. The

claimant and another former employee testified that they understood the policy to mean that no drink order could be entered into the system until the 30 minutes had passed. They also testified that this policy was being strictly enforced after the incident where a guest became intoxicated. The claimant said that she had been suspended for an alcohol policy violation, specifically that a guest had more than one alcoholic beverage within 30 minutes. She said she was terrified of losing her job.

The employer's witnesses were not clear on whether the policy was that no drink could be ORDERED or whether no drink could be SERVED unless 30 minutes had passed. No written policy was provided nor was there any testimony that there was a written policy on how this 30 minutes should be calculated. In addition, the claimant testified that no drink order could be entered into the system after 1:10 a.m. The evidence is uncontroverted that the drink order was entered into the system at 1:12 a.m.

The most reasonable inference from the evidence is that there was a valued guest in the casino that evening. He was accustomed to having a drink every 30 minutes and for some reason he did not hear the last call. The employer wanted to accommodate this guest and so he was served a drink sometime after 1:12 a.m. No one, including the claimant, knows exactly when the guest was served. The claimant reasonably believed that there had been a violation of the employer's policy on serving alcohol because a drink was entered into the system after 1:10 a.m. and that the guest may have been served prior to the expiration of the 30 minutes. The claimant may have been mistaken on the facts and perhaps there was no violation of the policy. However, the administrative law judge believes that the claimant made this report in good faith and not with the intent of causing dissension in the workplace. She credibly testified she was terrified of losing her job and that if there had been a violation and she did not report it, she could be terminated.

There is insufficient evidence in this record to conclude that the claimant was terminated for disqualifying misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 14, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs